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INTRODUCTION

THERE is a growing problem of workplace pregnancy discrimination in our nation. The number of women claiming they have been discriminated against on the job because they are pregnant is soaring even as the birth rate declines.

"Pregnancy discrimination complaints filed with the federal Equal Employment Opportunity Commission (EEOC) jumped 39% from fiscal year 1992 to 2003. During that same time, the nation's birth rate dropped 9%.[2] In 2003, the nation's birth rate fell to a record low as both women and teenagers in their prime childbearing years had fewer babies.[3] Despite this, "[t]he surge in pregnancy discrimination complaints makes it one of the fastest-growing types of employment discrimination charges filed with the EEOC—outpacing the rise in sexual harassment and sex discrimination claims."[4]

"The increasing number of discrimination allegations likely corresponds to the growing proportion of women in the workforce, coupled with the rising percentage of women who continue to work while pregnant."[5] In 2006, 59.4% of women 16 or older participated in the labor force. This amounted to 70.2 million women.[6] But the growing presence of women

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2 *See Pregnancy Discrimination Charges*, U.S. Equal Opportunity Commission, http://www.eeoc.gov/stats/pregnanc.html.

3 *See Nation's Birth Rate Falls to Record Low*, USA TODAY, Jun. 26, 2003, http://www.usatoday.com/news/nation/2003-06-26-birth-ratex.htm; *see also U.S. Birth Rate Hits All-Time Low*, http://usgovinfo.about.com/cs/censusstatistic/a/aabirthrate.htm.

4 Stephanie Armour, *Pregnant Workers Report Growing Discrimination*, USA TODAY, Feb. 16, 2005, http://www.usatoday.com/money/workplace/2005-02-16-pregnancy-bias-usat_x.htm.

5 Thomas H. Barnhard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 116 (2005).

6 *Household Data Annual Averages*, U.S. Department of Labor, Bureau of Labor Statistics, http://www.bls.gov/cps/cpsaat2.pdf (last visited Nov. 16, 2007).

in the workforce may not translate into better workplace treatment.[7] "[Pregnancy discrimination] charges are coming from a range of women, from those in entry–level jobs as well as those in executive suites."[8]

In addition, pregnancy discrimination cases are costing corporations more and more money. In fiscal year 1992, the EEOC collected $3.7 million in pregnancy discrimination cases.[9] In 2005, the amount collected rose to $11.8 million.[10] In fiscal year 2000, the amount collected peaked at $20.6 million.[11] These amounts do not even include "monetary benefits obtained through litigation."[12] The escalation of pregnancy discrimination cases in the United States indicates a need to address pregnancy discrimination in the workplace and the laws that govern these issues.

This Note traces the legal rights afforded pregnant women by Title VII and the Pregnancy Discrimination Act.[13] Next, it addresses courts' efforts to define gender–based discrimination and compares the standards used by courts to determine who is "similarly situated" with pregnant employees.[14] It discusses the flaws in each standard and recommends a model approach for courts.[15] Finally, this Note examines the interests of pregnant employees and their employers to find a balance between both parties' interests.[16]

I. The Pregnancy Discrimination Act

In an effort to eliminate pregnancy discrimination, Congress amended Title VII of the Civil Rights Act of 1964.[17] This amendment, titled The Pregnancy Discrimination Act of 1978, provides that discrimination "on the basis of pregnancy, childbirth, or related medical conditions" constitutes unlawful sex discrimination under Title VII.[18] With the passage of the Pregnancy Discrimination Act in 1978, Congress amended the definitional section of Title VII as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment–related

7 Barnhard & Rapp, *supra* note 5, at 116.

8 *See* Armour *supra* note 4.

9 *Pregnancy Discrimination Charges*, *supra* note 2.

10 *Id.*

11 *Id.*

12 *Id.*

13 *See infra* notes 17–29 and accompanying text.

14 *See infra* notes 30–110 and accompanying text.

15 *See infra* notes 111–22 and accompanying text.

16 *See infra* notes 123–32 and accompanying text.

17 42 U.S.C. §2000e(k) (2000).

18 *Id.*

> purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[19]

Title VII covers employers with 15 or more employees, including state and local governments.[20] Title VII also applies to employment agencies and to labor organizations, as well as to the federal government.[21]

"The [Pregnancy Discrimination Act] was designed to address the stereotype that women are less desirable employees because they are liable to become pregnant."[22] The prohibition of pregnancy discrimination provides many protections for pregnant women and their ability to obtain maternity leave. As far as hiring, an employer cannot refuse to hire a pregnant woman because of her pregnancy, pregnancy–related conditions, or because of the prejudices of co–workers, clients, or customers.[23] After being hired, if an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee.[24]

However, "employers are not obligated to give special treatment to pregnant women."[25] For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments, or take disability leave or leave without pay, the employer also must allow an employee who is temporarily disabled due to pregnancy to do the same. There can be no disparate treatment among the two groups.

Pregnant employees must be permitted to work as long as they are able to perform their jobs.[26] If an employee has been absent from work as a result of a pregnancy–related condition and recovers, her employer may not require her to remain on leave until the baby's birth.[27] An employer may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.[28] Employers must also hold open a job for pregnancy–related absence the same length of time jobs are held open for employees on sick or disability leave.[29]

Although there are many protections in place for pregnant women, these protections are difficult to interpret because it is the woman, not the

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19 *Id.*

20 *Id.* § 2000e(b).

21 *Id.*

22 Maria G. Danaher, *Limited Light Duty Does Not Violate the Pregnancy Discrimination Act*, 8 LAWYERS J. 2, 2 (2006).

23 *See* 42 U.S.C. §2000e(k) (2000).

24 *See id.*

25 Danaher, *supra* note 18, at 2.

26 *See generally* 42 U.S.C. §2000e(k).

27 *See generally id.*

28 *See generally id.*

29 *See generally id.*

company, that has the ability to determine whether an activity is safe or unsafe for the pregnancy. Oftentimes, a company's interpretation of what is necessary for the pregnant woman is not the same as her interpretation. Thus, balancing the two interests becomes a difficult task for courts.

The difficulty in balancing the woman's interests with that of the company she works for is clearly illustrated in a situation involving light-duty assignments. Many women choose to stay at work during pregnancy, but request that their assignments be light-duty assignments. Employers have difficulty addressing situations such as this. They must abide by the protections given to pregnant women by allowing pregnant women to continue working as long at they deem appropriate. To force a pregnant woman to stop working due to her pregnancy would be unlawful under the current laws. On the other hand, do the current laws *necessarily* require employers to accommodate pregnant women by providing light-duty assignments? The implications of such a requirement could severely affect employers. Many employers specialize in an area limited to heavy-duty work. Other employers might not have openings for light-duty positions and will have to suffer a financial loss in order to divide the light-duty work amongst an unnecessary amount of employees. What exactly is the law that employers must follow when it comes to light-duty requests from pregnant women?

II. LIGHT-DUTY ASSIGNMENTS IN THE WORKPLACE

A. *Determining the Meaning of "Similarly Situated"*

Audrey is employed as a local police officer. She is three months pregnant. Although she originally planned on working through her pregnancy, her physician recently informed her that she could cause serious harm to her unborn child if she continues the physical activity generally required of police officers, and accordingly, restricted her to light-duty work. For the remainder of her pregnancy, Audrey must perform light-duty work or not work at all.[30]

Audrey's employer must decide whether to grant her light-duty assignments, force her to use her sick leave, or terminate her for no longer being able to meet the performance requirements of a police officer. The employer is aware of the Pregnancy Discrimination Act and understands that the proper course of action would purport to treat Audrey the same as other "similarly situated" police officers. Which employee does Audrey resemble:

30 This hypothetical is similar to one provided in Jessica C. Manners, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L. J. 209, 209–10 (2005).

- John, an officer with heart disease, who was granted a six–month leave of absence for cardiac bypass surgery;
- Robert, an officer suffering from a sprained ankle as a result of playing basketball with some college friends, who was denied light–duty assignments and must use sick leave or face unpaid leave;
- Sarah, an officer injured on the job from a car chase that resulted in her cruiser colliding with a telephone pole, who received light–duty assignments and workers' compensation payments; or
- Tim, an officer who became permanently impaired and could no longer perform the duties of a police officer, who was subsequently released from the police force.

The answer is none of the above. Audrey's condition does not closely resemble any of the other officers' conditions. Pregnancy is not comparable to the severity of John's heart transplant. Pregnancy is also not similar to either of the off–the–job or on–the–job injuries sustained by Robert or Sarah. Audrey's pregnancy is also unlike the permanent impairment of Tim.

Audrey's situation is fictional, but her story is common. The ambiguity of the law that employers must follow when deciding light–duty requests primarily rests in determining the appropriate group to compare pregnant women to—the group that is most "similarly situated," as The Pregnancy Discrimination Act mandates. As the example above illustrates, this is a daunting task. "Because pregnancy is such a unique condition with no male counterpart, courts constantly struggle with which employees are similar to pregnant employees in their ability or inability to work."[31] The following cases demonstrate the courts' futile attempts to clarify the meaning of "similarly situated."

B. Reeves v. Swift Transportation Co.

Ensley–Gaines v. Runyon[32] used to provide employers in the Sixth Circuit with the standard for "similarly situated." In *Ensley–Gaines,* the Sixth Circuit defined "similarly situated" in terms of ability or inability to work.[33] Place of injury (on or off the job) did not define "similarly situated." If an employee with an occupational injury and a pregnant employee could perform similar tasks, the employer could not grant light–duty assignments to the employee with an occupational injury and fail to grant the same for the pregnant employee.

31 *Id.* at 210 (internal punctuation omitted).

32 Ensley–Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996).

33 *Id.*

But a recent decision of the Sixth Circuit Court of Appeals changed the meaning of "similarly situated." In *Reeves*,[34] the plaintiff, Amanda Reeves, formerly worked for the employer, Swift Transportation Company (Swift) as an over–the–road truck driver. She claimed that her employer unlawfully terminated her when she became pregnant and brought an action alleging disparate treatment in violation of the Pregnancy Discrimination Act.[35]

"Reeves started working for Swift around August 9, 2002."[36] She was informed that working as a truck driver would require physical activity such as bending, climbing, and lifting. "[She] understood that her job could require her . . . to push freight weighing up to 100 pounds with brute force", and she further signed a form representing "that she could bear this level of physical strain."[37]

"About three months after Reeves started working for Swift, on November 2, 2002, she learned that she was pregnant."[38] Her physician restricted her to light work only, but Swift insisted that it had no light work for her to do.[39] After continual requests for light–duty assignments by Reeves, and denials by Swift, Swift terminated Reeves on November 14, 2003, because it had no work for her to do.[40]

Swift claimed that Reeves was terminated pursuant to a pregnancy–blind policy denying light–duty work to employees who could not perform the heavy lifting and also were not injured on the job.[41] Swift had maintained a policy of providing light–duty work only to employees who had sustained on–the–job injuries in order to accommodate their injuries and Swift's work needs.[42] Such light–duty assignments included answering phones, entering orders, filing and the like.[43]

This case started in the United States District Court for the Western District of Tennessee, which granted Swift summary judgment.[44] "The district court noted that 'to hold otherwise would result in the Court affording pregnant women more benefits and better treatment than other employees, instead of equal benefits and the same treatment as intended by the' Act."[45] Reeves appealed, and the Sixth Circuit Court of Appeals affirmed, holding that Swift's policy of granting light–duty assignments

34 Reeves v. Swift Transp. Co., 446 F.3d 637 (6th Cir. 2006).

35 *See id.* at 640.

36 *Id.* at 638.

37 *Id.*

38 *Id.*

39 *Id.*

40 *See id.* at 639.

41 *See id.*

42 *See id.*

43 *See id.*

44 *Id.*

45 *Id.*

only to workers who sustained job–related injuries was a legitimate, non–pregnancy based reason for Reeves' discharge.[46] The court found that the terms of the employer's light–duty policy do not support an inference of pregnancy discrimination, as it treated all temporarily disabled employees the same; the granting of light–duty assignments was contingent on the existence of job–related injuries.[47] The court further stated that Reeves did not produce direct evidence that could prove that discrimination occurred without requiring further inferences.[48]

C. Urbano v. Continental Airlines

Reeves is supported by other decisions in the Fifth and Eleventh circuits. The Fifth and Eleventh circuits rejected claims materially identical to those in *Reeves.* In *Urbano v. Continental Airlines*, Mirtha Urbano worked for Continental Airlines as a ticketing sales agent.[49] In that capacity, "she assisted customers with sales and checking–in passengers and their baggage, often lifting loads in excess of twenty pounds."[50]

About four years after she started working for Continental, Urbano learned she was pregnant.[51] Subsequently, "she began suffering low–back discomfort and went to see her doctor.[52] Her doctor ordered that she refrain from lifting anything over twenty pounds during her pregnancy, so Urbano requested to work in a Service Center Agent position, which does not require lifting heavy loads.[53] Continental denied Urbano's request "because Continental's transitional duty policy grants light–duty assignments only to employees who suffer an occupational injury."[54] As a result, Urbano was forced to take unpaid medical leave.[55] She brought suit against the airline for pregnancy discrimination, and the United States District Court for the Southern District of Texas entered summary judgment for Continental.[56]

"To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green.*"[57]

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46 *See id.* at 640.

47 *See id.*

48 *See id.*

49 Urbano v. Continental Airlines, 138 F.3d 204, 205 (5th Cir. 1998).

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 206; *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

> The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated.[58]

However, if the employer provides a legitimate, nondiscriminatory reason for the employment action, the trier of fact must then "determine whether plaintiff has proved that the defendant intentionally discriminated against [her] because of [her sex]."[59] The district court found that Urbano "failed to meet the second prong of her prima facie case for disparate treatment" because she could not provide evidence that she was qualified for transfer into a light-duty position since she did not sustain a work-related injury.[60] The Fifth Circuit unanimously agreed, stating that Continental treated Urbano the same "as it would have treated any other worker who was injured off the job."[61] The court found that Urbano's back injuries were not caused by her work for Continental, and the airline's denial was based on this determination; it was not based on a determination involving Urbano's pregnancy.[62]

Urbano involves a light-duty policy identical to that of *Reeves*, and the final determination was the same as that of *Reeves*—there was no probative evidence that the distinction between injuries sustained on the job and those sustained off the job was a pretext for discrimination against pregnant women and ruling for the plaintiff would have the effect of granting a right of special treatment for pregnant employees.[63]

D. Spivey v. Beverly Enterprises, Inc.

The Eleventh Circuit reached the same conclusion when evaluating another materially identical light-duty policy.[64] In *Spivey*, Michelle Spivey "was employed on June 13, 1996, as a certified nurse's assistant at the Boaz Health and Rehabilitation Center, which is owned and operated by [Beverly Enterprises, Inc.]"[65] Her primary duties "were to lift and reposition patients, assist with patient baths and meals, and provide general

58 Urbano v. Continental Airlines, 138 F.3d 204, 206 (5th Cir. 1998).

59 *Id.* (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)).

60 *Id.* at 206.

61 *Id.*

62 *See id.*

63 *Id.* at 208.

64 *See* Spivey v. Beverly Enters., 196 F.3d 1309, 1313 (11th Cir. 1999).

65 *Id.* at 1311.

patient care."[66] After Spivey learned that she was pregnant, she obtained a doctor's restriction imposing a lifting limitation of 25 pounds.[67]

Boaz, however, would not accommodate Spivey because its policy stated that "employees were excused from meeting their job responsibilities only if they qualified for modified duty, which was available exclusively to employees who suffered from work–related injuries."[68] Boaz

> reserve[d] modified duty for employees with occupational injuries because there are only a limited number of light duty tasks available at any one time. If light duty were made available to all employees without regard to whether the injury was work–related, the light duty "positions" would be depleted and unavailable when needed by employees with workers' compensation restrictions.[69]

Spivey sued her employer, Beverly Enterprises, Inc., claiming Boaz's "provision of modified duty for employees injured on the job, but not for pregnant employees, violated the Pregnancy Discrimination Act."[70] Spivey argued "that she should have been given the accommodation of modified duty because she was as capable of performing the duties required of a modified–duty assignment as non–pregnant employees who were injured on the job."[71] The court held that the employer, however, was under no duty "to extend this accommodation to pregnant employees."[72]

Under the court's analysis, '[t]here are two types of discrimination actionable under Title VII, disparate treatment and disparate impact."[73] Proof of discriminatory intent is necessary for a plaintiff to succeed on a disparate treatment claim, but no evidence is required under a disparate impact claim.[74] As for disparate treatment, the court found that Spivey "failed to establish that she suffered from a differential application of work rules."[75] "Ignoring [Spivey]'s pregnancy would still have left [Boaz] with an employee who suffered from a non–occupational injury."[76]

In addition to the disparate treatment claim, Spivey alleged that Boaz's policy of providing modified duty only to employees who are injured on the job has a disparate impact on pregnant employees.

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66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.* at 1312 n.1.
70 *Id.* at 1312.
71 *Id.* at 1311.
72 *Id.*
73 *Id.*
74 *Id.* at 1313.
75 *Id.*
76 *Id.* at 1314.

> Establishing a prima facie case of disparate impact discrimination involves two steps. First, the plaintiff must identify the specific employment practice that allegedly has a disproportionate impact. Second, the plaintiff must demonstrate causation by offering statistical evidence sufficient to show that the challenged practice has resulted in prohibited discrimination.[77]

The court determined that Spivey established the first element, but "failed to present statistical evidence to demonstrate that this policy in practice has a disproportionate impact on pregnant employees."[78]

E. Equal Employment Opportunity Commission v. Horizon/CMS Healthcare Corp.

Unlike the Fifth, Sixth, and Eleventh Circuits, the Tenth Circuit has a different opinion about light-duty assignments. In *Equal Employment Opportunity Commission v. Horizon/CMS Healthcare Corp.*, the EEOC sued Horizon/CMS Healthcare Corporation ("Horizon") on behalf of four charging parties.[79] The EEOC claimed Horizon "unlawfully denied the charging parties and a group of similarly situated pregnant employees modified-duty when they became unable to perform heavy lifting due to their pregnancies."[80] The company, like those in the cases discussed in Parts B–D, *supra*, had a policy that only allowed modified duty to employees injured on the job.[81]

Three of the four parties represented by the EEOC held the position of Certified Nursing Assistant (CNA).[82] The job required that each CNA be able to lift up to seventy-five pounds.[83] The fourth party represented by the EEOC in this matter worked as an Activity Assistant.[84] All four parties became pregnant during their employment and were placed under lifting restrictions by their physicians.[85] The parties requested, but were not granted modified-duty assignments, and as a result, were unable to perform their job duties.[86] They were all subsequently terminated, laid off, or placed on unpaid leave of absence.[87]

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77 *Id.* (citing Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1314 (11th Cir. 1994)).

78 *See* Spivey v. Beverly Enters., 196 F.3d 1309, 1314 (11th Cir. 1999).

79 Equal Employment Opportunity Comm'n v. Horizon/CMA Healthcare Corp., 220 F.3d 1184, 1188–89 (10th Cir. 2000).

80 *See id.* at 1189.

81 *See id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* at 1189–90.

87 *Id.*

The district court granted summary judgment to Horizon on the disparate treatment claim, and dismissed the disparate impact claim.[88] The EEOC appealed the summary judgment on the disparate treatment claim.[89] The parties conceded that the EEOC met its burden of showing that the parties EEOC represented were protected–class members that had suffered an adverse employment action when denied modified–duty assignments.[90] However, the district court found that the EEOC failed to show that the parties it represented were both qualified for the modified–duty position and that the parties "were treated less favorably than similarly situated employees."[91]

On appeal, the Tenth Circuit addressed both of these unsatisfied elements of a prima facie case for discrimination. In order to adequately address whether a prima facie case had been made by the EEOC, the court considered the charging parties' qualifications for the modified–duty positions sought.[92] Specifically, the court considered whether "an employer may defeat an [employee's] prima facie case by challenging the [employee's] qualification for the position on grounds she has failed to meet an objective qualification that is not essential to the performance of the job."[93]

The Tenth Circuit previously determined in *Burrus v. United Telephone Co. of Kansas*,[94] that an employer may not defeat a plaintiff's prima facie case for discrimination by asserting that the plaintiff failed to satisfy subjective hiring qualifications.[95] The Burrus court reasoned that doing so would deny the plaintiff the opportunity to demonstrate that those subjective hiring criteria were a means to effect discriminatory action.[96] Regarding objective hiring qualifications, the Horizon court correspondingly stated that "[the] purpose behind the *McDonnell Douglas* prima facie burden is to require a plaintiff to eliminate the most common legitimate reasons for the adverse employment action suffered."[97] The *Horizon* court further determined that

> a plaintiff's failure to meet employer–imposed objective qualifications that have no relation to the performance of the job at issue is irrelevant at the prima facie stage of the *McDonnell Douglas* inquiry because it does not

88 *Id.* at 1190.

89 *Id.*

90 *See id.* at 1192.

91 *See id.*

92 *See id.*

93 *Id.*

94 Burrus v. United Tele. Co. of Kan., 683 F.2d 339 (10th Cir. 1982).

95 *See* Equal Employment Opportunity Comm'n v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192 (10th Cir. 2000) (citing *Burrus*, 683 F.2d at 342).

96 *Id.*

97 *Id.* at 1193.

compel the conclusion that the plaintiff suffers from an "absolute or relative lack of qualifications."[98]

The *Horizon* court found that "the relevant inquiry at the prima facie is not whether an employee . . . is able to meet all the objective criteria adopted by the employer, but whether the employee has introduced some evidence that she possesses the objective qualifications necessary to perform the job sought."[99] The Tenth Circuit found that the EEOC had satisfactorily demonstrated that the parties it represented possessed the skills necessary to perform the positions they sought, and therefore met their prima facie burden to establish a case for discrimination.[100]

Subsequently, Horizon made the argument that the parties represented by the EEOC were not treated less favorably than their non–pregnant co–workers.[101] However, Horizon assumed the pregnant women were being compared to employees "temporarily disabled as a result of an injury suffered off the job."[102] Contrarily, the EEOC argued that the pregnant women are most appropriately compared to "temporarily–disabled, non–pregnant employees whether they sustained their injuries on or off the job."[103] While the court used Horizon's comparison of pregnant women with employees temporarily disabled off the job, the court explained that this is not necessarily the proper articulation of similarly situated employees.[104] Alternatively, the court stated that other comparisons may also be appropriate.[105]

Ultimately, the court concluded that the EEOC established a prima facie case of pregnancy discrimination by presenting sufficient evidence to conclude that Horizon's reason for denying modified duty to the EEOC's parties was pretextual.[106] However, this case differs slightly from the cases previously discussed for two reasons. First, the EEOC presented evidence that Horizon treated two non–pregnant employees who sustained off–the–job injuries more favorably than pregnant employees.[107] Second, genuine issues of material fact existed as to whether the employer's proffered reason for denying modified–duty assignments to pregnant women was pretextual.[108] The *Horizon* court explained that "[a] plaintiff

98 *Id.*
99 *Id.*
100 *Id.* at 1194.
101 *Id.*
102 *Id.*
103 *Id.* at 1194–1195.
104 *Id.* at 1195 n.6.
105 *Id.*
106 *Id.* at 1200.
107 *Id.* at 1196.
108 *Id.* at 1200.

[can] establish[] pretext by revealing 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.'"[109] The EEOC successfully showed that the employer's reason for its modified–duty policy—reducing workers' compensation costs—was illegitimate because the company never researched or inquired as to whether such a policy would actually reduce those costs.[110] Thus, a modified–duty policy, the reasons for which are uncorroborated by investigation or other findings, presents a genuine issue of fact as to whether the policy is a pretext for discrimination.

III. Comparing the Circuit Split: Which Side Gets it Right?

The Fifth and Eleventh Circuits have been in agreement on the issue of employer's light–duty policies.[111] Simply put, these circuits agree that if an employer has a pregnancy–blind policy that does not treat pregnant women different from other similarly situated employees, there is no violation of the Pregnancy Discrimination Act.[112] The Fifth and Eleventh Circuits apply this "similarly situated" rule, and identify temporarily disabled employees injured off the job as the proper group with which to compare pregnant women.[113] The Sixth Circuit, in the recent decision in *Reeves*, concurred with the Fifth and Eleventh Circuits.[114]

In the Tenth Circuit, the same rule applies, but a different group is used with which to compare pregnant women when determining whether discrimination exists.[115] The Tenth Circuit considers additional factors such as (1) the possibility that pregnant women should be compared to the treatment given to all temporarily disabled employees and not just those injured off the job and (2) the corroboration between the policy and the reasons the employer implemented such a policy.[116]

Which side gets it right? It is a difficult task to balance both the interests of pregnant women—many of which need to continue and are capable of continuing their work when given modified tasks—and the interests of employers that cannot bear the financial burden to grant pregnant workers light–duty assignments, or could not function if pregnant women were

109 *Id.* at 1198 (citing Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1317 (10th Cir. 1999)).

110 *See* Equal Employment Opportunity Comm'n v. Horizon/CMA Healthcare Corp., 220 F.3d 1184, 1197 (10th Cir. 2000).

111 *See* Reeves v. Swift Transp. Co., 446 F.3d 637, 642 (6th Cir. 2006).

112 *See id.*

113 *Id.*

114 *Reeves*, 446 F.3d 642.

115 *Horizon*, 220 F.3d 1184, 1194–95 (10th Cir. 2000).

116 *Id.* at 1195 n.7.

required to be given light-duty assignments. In determining the more accurate, less discriminatory approach, we must examine factors such as inherent discrimination and policy implications.

A. Inherent Discrimination

When examining the correct group with which to compare pregnant women, the Tenth Circuit has the most defensible position. Employers that implement policies that only allow light-duty assignments to employees injured on the job is inherently discriminatory against pregnant women. Under such policies, it is clear that no pregnant woman will ever receive modified duties. Pregnant women usually cannot fall into the classification of "injured on the job" because pregnancy is an ongoing, temporary disability that does not usually have a strong relationship to a discrete, on-the-job accident or occurrence. Therefore, this is a way for employers who do not want to provide such accommodations for pregnant women to avoid violating the Pregnancy Discrimination Act in the Fifth and Eleventh Circuits.

The Tenth Circuit's additional consideration of the employer's true intention in implementing such a policy is worth noting. An examination of intent clarifies whether a policy is needed or whether it does not serve a rational purpose. If a policy that favors employees injured on the job over those injured off the job does not serve a rational purpose, and is also inherently discriminatory toward pregnant women, then the policy should be void for public policy reasons. The capacity in which an employee sustained an injury has no relevance as to his/her qualification to complete the modified duties. Such a policy is not "pregnancy-blind" because pregnant women can never fall into the "injured on the job" category and employers are aware of that. Employers may not be able to predict where injuries will occur (on of off the job), but they can be certain that by establishing a *Reeves*, *Urbano*, or *Spivey* policy, they will owe no obligation to pregnant women. This is inherently discriminatory, and to remedy this problem, the Tenth Circuit looked to the reasoning behind potentially discriminatory policies. The court established by implication a two-part test:

> (1) the court must look to see whether, under the circumstances, the proper group with which to compare pregnant women is all temporarily disabled employees or temporarily disabled employees injured off the job; and
> (2) the court looks at the relationship between the policy and the employer's reasoning for implementing such policy.[117]

117 *Id.* at 1195–98 (This test is extrapolated from the courts' opinion and is not put forth by the court as such an explicit test).

Unlike the test applied by the Fifth, Eleventh, and now Sixth Circuits, the first part of the *Horizon* test does not exclusively compare pregnant women with temporarily disabled employees injured on the job.[118] There may be situations when a court feels that the more appropriate group with which to compare pregnant women is all temporarily disabled employees. Under the Tenth Circuit's test, a court may select the more appropriate comparison group. The test in the Fifth, Eleventh, and Sixth Circuits allows no room for such discretion. Furthermore, the Tenth Circuit's application serves as a caution to employers. Employers cannot be certain, under the Tenth Circuit's rule, that a policy will pass muster if it is not discriminatory when compared only to temporarily disabled employees injured off the job. Therefore, employers are encouraged to take further precautions to ensure that they limit light–duty work by using a method that is narrowly tailored.

The second part of the Tenth Circuit's test looks at the employers' motivation for implementation of their policy.[119] An inquiry into employers' motivation for implementing a modified–duty policy distinguishes between those with legitimate and illegitimate purposes. Only employers who can identify legitimate business objectives will pass muster. Contrarily, the Fifth, Eleventh, and Sixth Circuits' test sends employers the message that as long as they develop a policy that is not discriminatory when comparing pregnant women to other temporarily disabled employees injured off the job, their policy will be upheld regardless of the impact it may have on pregnant women or the intent to discriminate by the employer. It provides an easy method by which employers may knowingly discriminate against pregnant employees without fear of liability. In sharp contrast, the *Horizon* test enforces liability where illegitimate discriminatory intent lies by looking beyond an employer's alleged intent.

B. Policy Implications of Requiring Employers to Grant Light–Duty Assignments

According to the U.S. Department of Labor, women made up 46.4% of the workforce in 2004.[120] Thus, employers may be hard hit, especially if they have a large number of women who request light–duty assignments. Productivity can suffer and there can be extra work for co–workers that are forced to pick up the slack. Granting light–duty assignments may have a particular effect on three main groups: (1) small businesses, (2) businesses

118 *Id.* at 1195–98.

119 *Id.* at 1197–98.

120 *Employment Status of the Civilian Noninstitutional Population by Age and Sex*, U.S. Department of Labor, Bureau of Labor Statistics, http://www.bls.gov/cps/wlf–table1–2005.pdf.

that typically employ women of child–bearing age, and (3) businesses with critical times.

Small businesses have fewer employees to pick up the slack when pregnant employees request light–duty assignments. Although the Pregnancy Discrimination Act of Title VII applies to employers with 15 or more employees, there are still small businesses that Title VII does apply to. Some small businesses (e.g. 16 employees), unlike their larger counterparts, may have very little light–duty work to accommodate the needs of pregnant employees. To require that they provide light–duty assignments to pregnant women could possibly put them out of business! Employers would find themselves "creating" unnecessary tasks just to provide pregnant women with work. Title VII and The Pregnancy Discrimination Act were not likely meant to go so far.

Businesses that typically employ women of child–bearing age may also be victims of a requirement to grant light–duty work to pregnant women. For example, nursing home and hospitals are staffed by many women of child–bearing age. Much of the work is not light duty. Cases previously discussed involved situations where nurses were unable to perform their duties that included rolling patients over, lifting patients, or pushing wheelchairs.[121] Can nursing homes and hospitals staffed mostly with women of child–bearing age function if they had to provide light–duty assignments to all pregnant women? When a job depends on the performance of heavy–duty work, and there is the potential that most of your employees of child–bearing age will request light–duty work. Necessarily, the employer risks not having enough employees capable of completing all the heavy–duty work that needs to be done. And, as mentioned before by employers, there is only so much light–duty work that needs to be done. For employers to spend time "creating light–duty assignments" in order to satisfy The Pregnancy Discrimination Act would in essence be giving pregnant women preferential treatment.[122]

Businesses with critical time constraints are in the same situation as the two previous groups. Post offices and package carriers, particularly around the holiday season, are examples of industries that need their employees to be able to participate in heavy–duty activity during certain integral times of the year. Employers can suffer financial and productivity consequences if they hire a woman who needs light–duty assignments when the business demand is at its peak. Thus, there are severe policy and business implications of regulating employer modified–duty policies.

121 *See* Equal Employment Opportunity Comm'n v. Horizon/CMA Healthcare Corp., 220 F.3d 1184, 1189 (10th Cir. 2000); Spivey v. Beverly Enterps., Inc., 196 F.3d 1309, 1311 (11th Cir. 1999).

122 *See* Urbano v. Continental Airlines, Inc., 138 F.3d 204, 208 (5th Cir. 1998).

IV. Model Policy

The two factors discussed above, inherent discrimination and policy implications, are of emphasis when forming a proper test for courts to apply. The test must be clear and courts must be able to apply it consistently. It must protect the interests of Title VII and prohibit discrimination against pregnant women when compared with a proper, similarly situated group. And, it must not burden employers so much that they will face insurmountable economic hardship. In light of these considerations it seems that the proper test is one similar to the Tenth Circuit's in *Equal Opportunity Commission v. Horison/CMS Healthcare Corp.*[123]

However, a problem that exists with this test is that courts cannot be trusted to select which comparison group to use. The difficulty in allowing courts to pick and choose whether pregnant women should be compared to all temporarily disabled employees or just those injured off the job lies in the fact that courts may arbitrarily decide whether to apply an easier or stricter standard on certain employers. Furthermore, the standard would be ambiguous and employers would not be able to predict which standard would be applied to them if courts determined this factor on a case–by–case basis. Better procedure would be to establish a two–part balancing test that examines (1) discriminatory impact and (2) discriminatory intent.

First, courts should determine whether there is discriminatory impact through consideration of a number of factors. Courts can compare the number of pregnant women denied light–duty requests, the number of temporarily disabled employees injured off the job who are denied light–duty requests, and the number of temporarily disabled employees injured on the job who are denied light–duty requests. These numbers may indicate inconsistency in the employer's policy and show, for instance, that temporarily disabled employees injured off the job had in fact been granted light–duty assignments.

Courts could also consider whether the complaining pregnant employee was qualified to perform the work she was denied. If not, then there is no discriminatory impact because her denial would not be based on pregnancy as much as her lack of qualification. Courts should also look at whether the pregnant woman denied work actually suffered any harm. A pregnant woman could apply for light–duty assignments not knowing whether she will actually work if granted light–duty assignments. In a situation such as this where the pregnant woman has no intention of working and does not suffer any hardship from not working, there may not be any impact from the denial.

The discriminatory impact prong of this test is a threshold determination, much like standing. Courts must determine whether discrimination and

123 *Horizon*, 220 F.3d at 1195–98.

harm result from the employer's policy and whether a court could properly remedy the problem. This threshold determination satisfies the interests of Title VII and pregnant women.

Second, courts should determine whether there is discriminatory intent. This prong satisfies the interest of employers as discussed *supra* Part III–B. Where an employer faces unreasonable economic hardship by providing light–duty work to pregnant employees, courts will be less likely to find discrimination.

In *Troupe v. May Department Stores Co.*,[124] an employer successfully asserted a business justification defense.[125] In *Troupe*, the Eleventh Circuit held that an employer who terminated a pregnant employee because of fear that she would not return after her pregnancy leave, and wanted to avoid paying the costs of her maternity leave, constituted a legitimate non–discriminatory reason for her termination.[126] It follows that these economic factors play an important role in determining whether an employer *intended* for the policy to be discriminatory or if the employer had a legitimate interest in implementing such a policy.[127]

Courts should balance discriminatory impact and discriminatory intent to make a final determination as to whether the employer's policy should be upheld. This balancing test would deter employers from creating potentially discriminatory policies because it does not give employers sweeping protection as do the tests in *Reeves*,[128] *Urbano*,[129] and *Spivey*.[130] Neither does it require employers to grant light–duty regardless of the potential burden on the employer, as could occur with the *Ensley–Gaines*[131] standard. Nor does it grant courts broad authority to pick and choose different tests to apply to what may be identical facts.[132] It is truly a "balancing" test and is the proper test to apply in the many pregnancy discrimination cases that continue to flood the courts.

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124 Troupe v. May Dept. Stores Co., 20 F.3d 734 (11th Cir. 1994).

125 Section 703(a)(2) codifies a defense to pregnancy discrimination. "If a company's business necessitates the adoption of particular leave policies, Title VII does not prohibit the company from applying these policies to all leaves of absence, including pregnancy leaves; Title VII is not violated even though the policies may burden female employees." Nashville Gas Co. v. Satty, 434 US 136, 143 (1977) (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

126 *Troupe*, 20 F.3d at 737–38.

127 Further discussion of the advantages of this factor can be found in *supra* notes 117–19 and accompanying text.

128 Reeves v. Swift Transp. Co., 446 F.3d 637 (6th Cir. 2006).

129 Urbano v. Continental Airlines, 138 F.3d 204 (5th Cir. 1998).

130 Spivey v. Beverly Enters., 196 F.3d 1309 (11th Cir. 1999).

131 Ensley–Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996).

132 This is the problem identified with the Tenth Circuit's test in *Equal Employment Opportunity Comm'n v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000), and is discussed in *supra* Part II–E.